APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-2504

HOLABIRD SPORTS DISCOUNTERS, a Maryland General Partnership,
Plaintiff-Appellant,

v.

TENNIS TUTOR, INCORPORATED, a California Corporation,
Defendant-Appellee,

and

PRINCE MANUFACTURING, INCORPORATED,
Party in Interest.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.

(CA-91-2208-WN)

Argued: March 31, 1993

Decided: May 7, 1993

Before RUSSELL and LUTTIG, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

PER CURIAM:

Holabird Sports Discounters ("Holabird") brings this appeal from an order of the district court granting summary judgment to Tennis Tutor, Incorporated ("TTI"), on Holabird's action under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. We affirm.

TTI manufactures a unique, portable, battery-operated tennis ball practice machine known as the Tennis Tutor. TTI markets Tennis Tutors primarily through a national network of 126 dealers. Holabird, a mail order sporting goods distributor, was one of TTI's dealers during 1989-90. The relationship between TTI and its dealers is governed in large part by a "Statement of Policy," which provides, *inter alia*, that "[TTI] will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements." J.A. at 151. This advertising restriction, which was independently formulated by appellee, does not prevent dealers from selling Tennis Tutors at whatever price they choose; instead, it only prohibits advertising the machines for sale at less than suggested retail price in regional or national publications. Advertising in local publications, direct mail flyers and catalogs, computer buying networks, and other media is not affected by the restriction. The purpose of TTI's advertising restriction is to maintain a healthy national distribution system through the prevention of "free-riding" by national mail order discount houses such as Holabird.[1]

---

[1] Free-riding occurs when a discounter takes advantage of customer services offered by local dealers. Since the Tennis Tutor is a complex, innovative machine, most prospective purchasers would not fully appreciate the benefits of the product unless dealers make the effort to explain the machine, set up demonstrations, and allow trial use. Without the advertising restriction, national mail order

TTI terminated Holabird's dealership in September, 1990, upon learning that appellant had violated the advertising restriction by placing an advertisement in *Tennis Magazine* that requested readers to call for the price of Tennis Tutors. Subsequently, appellee took independent action to ensure that other dealers did not divert Tennis Tutors to Holabird without TTI's consent. *Id.* at 571, 646-47. On two other occasions, TTI unilaterally enforced the advertising restriction, in one instance informing a prospective Tennis Tutor dealer of a violation,[2] and in the other apprising a dealer, which inadvertently had not been told of the restriction, that one of its advertisements violated TTI's policy. Both firms informed TTI that they would voluntarily comply with the advertising restriction in the future. *Id.* at 645-46.

On August 5, 1991, Holabird brought this action against TTI in district court, alleging that TTI's imposition and enforcement of the advertising restriction violated section 1 of the Sherman Act.[3] After nearly one year of discovery, TTI moved for summary judgment. The district court granted the motion on October 30, 1992.

---

discounters that offer no such special services could exploit the efforts of full-service local dealers: Customers would go to their local dealer to gather information about the Tennis Tutor, but could then order the machine for a lower price from a discounter that could afford to charge less than the local dealer because it did not have to bear the expense of customer services. According to TTI, this result would cause disgruntlement among local dealers, who would respond by refusing to carry Tennis Tutors or by cutting back on their services, either outcome of which would be detrimental to TTI. *See id.* at 368K-L, 640-41.

[2] The dealer, Sports Express, was deciding whether or not to become a TTI dealer, and placed the offending advertisement in an effort to gauge customer interest in the product. Sports Express was unaware of the restriction when it placed the advertisement.

[3] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1.

Viewing the case in light of *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and this court's application of *Monsanto* in *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), the district court held that Holabird had failed to produce sufficient evidence that TTI had entered into a contract, conspiracy, or combination with any of its dealers through its adoption or enforcement of the advertising restriction or through its termination of Holabird. Because of Holabird's failure to establish this necessary element of its Sherman Act claim, the court concluded, TTI was entitled to judgment.

We have read the briefs, heard oral argument, and given full consideration to Holabird's contentions. Finding no error in the thorough opinion of the court below, *Holabird Sports Discounters* v. *Tennis Tutor, Inc.*, Civil No. 91-2208-WN (D. Md. Oct. 30, 1992), and agreeing that, under *Parkway Gallery*, appellant failed to identify sufficient evidence tending to exclude the possibility that TTI and its dealers acted independently with regard to the advertising restriction, we affirm on the reasoning of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WN-91-2208

HOLABIRD SPORTS DISCOUNTERS

v.

TENNIS TUTOR, INC.

MEMORANDUM

Before the Court is Defendant's Motion for Summary Judgment (Paper No. 28). Plaintiff filed an Opposition (Paper No. 31) and Defendant has replied (Paper No. 32). Also before the Court is Plaintiff's Motion to Strike Declarations of Donald C. Deluca and Larry Brink (Paper No. 33). Upon a review of the motion and the applicable caselaw, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendant's Motion for Summary Judgment should be granted, and Plaintiff's Motion to Strike will be denied as moot.

I. BACKGROUND

The essential facts that gave rise to this action are undisputed. The Defendant Tennis Tutor, Inc. ["TTI"] is the manufacturer of a portable, battery operated tennis ball practice machine known as the Tennis Tutor. Plaintiff Holabird Sports Discounters ["Holabird"] is a mail order distributor of tennis equipment. Until September 1991, Holabird was a TTI distributor. A "Statement of Policy" provided by TTI to all its distributors states,

"Tennis Tutor will not sell, or will discontinue selling, Tennis Tutor machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements." Declaration of William Greene, Exhibit 1. In violation of that policy, Holabird placed an advertisement for the Tennis Tutor machine in the October 1990 edition of *Tennis Magazine* that included a call for price notation. When TTI learned of that advertisement, it terminated Holabird as a Tennis Tutor dealer. TTI also told Holabird that it would be reinstated as a dealer if it agreed in writing to abide by the Statement of Policy. Holabird refused. Holabird claims that its termination, as well as the advertising policy itself, constitutes a violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

TTI presents several arguments in support of its motion for summary judgment. First, TTI argues that Holabird has offered no probative evidence that TTI's policy or Holabird's termination was a part of a contract, conspiracy or combination. Second, TTI argues that even if a conspiracy could be proven, Holabird could not demonstrate that the advertising policy had an adverse effect on competition. In fact, TTI argues, the policy actually enhances interbrand competition. Finally, TTI asserts that Holabird cannot prove that it suffered any actual antitrust injury.

Because the court finds that Holabird has not produced sufficient evidence that TTI entered into a contract, conspiracy or combination with any other entity in its adoption of it advertising policy, or in its termination of Holabird, the Court need only address that issue.

II. SUMMARY JUDGMENT STANDARD

Summary Judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, estab-

lishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] [t]he moving party is 'entitled to judgment as a matter of law.'" *Id.* at 323 (citations omitted).

"A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984). "In the absence of such a minimal showing, a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial." *Purity Products, Inc., v. Tropicana Products, Inc.*, 702 F. Supp. 564, 568 (D. Md. 1988) *aff'd* 887 F.2d 1081 (4th Cir. 1989).

The Supreme Court once cautioned that summary procedures should be used "sparingly in complex antitrust ligation where motive and intent play leading roles." *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 473 (1962). More recently, however, the Court has held that the principals of Rule 56 are as fully applicable in an antitrust action as in any other civil action. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Matsushita*, the Supreme Court reversed a court of appeals reversal of a district court's grant of summary judgment in an antitrust case. While observing that the plaintiff is entitled to have all favorable inferences to be drawn from the evidence, the Court noted that "antitrust law limits the range of permissible

inferences from ambiguous evidence in an antitrust case." *Id.* at 588.

III. DISCUSSION

A. The Conspiracy Requirement

Section One of the Sherman Antitrust Act prohibits, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C.A. § 1 (West Supp. 1992).

It is undisputed that a manufacturer may terminate a dealer at any time and for any reason and not offend the antitrust law, so long as the manufacturer is acting unilaterally and independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Section 1 of the Sherman Act does not cover independent actions of a manufacturer, even if those actions unreasonably restrain trade. *Cooperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The burden is on the plaintiff to prove that the defendant manufacturer was not acting unilaterally.

Both parties correctly look to *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), to delineate the plaintiff's burden in establishing the conspiracy element in a § 1 action. *Monsanto* involved allegations that a manufacturer entered into an agreement with distributors to fix the resale price of the manufacturer's products. The court began its discussion of the conspiracy issue by noting that, under the *Colgate* doctrine, "[a] manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a dealer is free to acquiesce in the manufacturer's demand in order to avoid termination." 465 U.S. at 761. The Court went on to discuss the standard by which the sufficiency of the evidence of an agreement to restrain trade in a dealer termination case is to be judged:

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768.

In *Matsushita,* the Supreme Court elaborated upon its decision in *Monsanto*:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto,* we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."

475 U.S. at 588 (internal quotation and citations omitted).

B. TTI's Advertising Policy

TTI asserts that its advertising restraint is needed to enhance and protect its distribution network from "free riding" of national mail order discount houses. Without the restraint, TTI argues, mail order houses could "skim" sales from the local distributors who actually generated the sales in the first place by providing demonstrations, loaner machines, product information, hitting areas, and services. Motion at 10-11. This "skimming" would gradually erode the TTI dealer network.

TTI points out that its advertising restriction is quite narrow. It does not prohibit all discount price advertising, only advertisements in national print media. Dealers

are free to advertise discount prices in local media, catalogues, flyers or computer buying services. Holabird has, in fact, advertised Tennis Tutor machines through those media at a discounted price. Furthermore, TTI places no limits on dealers as to the price they must sell the machine. Dealers are free to sell at any price of their choosing. Motion at 10.[1]

Restraints to protect against "free riding" dealers have been routinely upheld as reasonable business policies. *See, e.g., Monsanto,* 465 U.S. at 762-63 (manufacturer can establish policy to seek to ensure that distributors earn sufficient profits to pay for product support services and to "see that 'free riders' do not interfere"); *O.S.C.*

---

[1] The parties argue at length whether the actions of TTI constituted a conspiracy to fix prices—evaluated as a *per se* violation of the Sherman Act—or merely a nonprice vertical restraint analyzed under the rule-of-reason analysis. This Court need not resolve that issue as the Fourth Circuit has determined the *Monsanto* analysis of the burden of proof on the conspiracy element applies equally to both price and nonprice restrictions. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989).

The Court notes, however, that the Supreme Court decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), provides strong authority to support the conclusion that TTI's advertising policy would be evaluated under the rule-of-reason, and not *per se* analysis. In *Sharp*, the Court noted that the rule-of-reason is the norm in § 1 cases, and that *per se* rules are only appropriate for "conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output." *Id.* at 723. The Court expressed reluctance to extend *per se* treatment in vertical restraint situations and concluded "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id.* at 735-36. *See also, Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943 (E.D. Tex. 1991) (holding that alleged inability to place advertisements which include price was not *per se* illegal in the absence of other evidence of an agreement to fix price). Plaintiff's "evidence" in the form of "doctored" quotations and opinions of experts that advertising restrictions are the "functional equivalent" of price fixing agreement is not persuasive. *See* Opposition at 10 & 13-14.

Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 (9th Cir. 1986) (upheld as "plausible and justifiable explanation of [its] conduct" the manufacturer's concern regarding "its dealer's capacity to withstand erosion of profit margins caused by having to carry "free rider" mail order dealers); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.) *cert. denied* 464 U.S. 829 (1983). TTI asserts, and Holabird has offered no evidence to the contrary, that TTI unilaterally and independently formulated this policy.

TTI having produced a credible explanation of its policy, the burden is then on Holabird to produce evidence that tends to exclude the possibility of independent conduct on the part of TTI: "Once allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy." *O.S.C. Corp.*, 792 F.2d at 1467.

C. *Holabird's Conspiracy Allegations*

Holabird points to several actions on the part of TTI in support of its claim of a conspiracy. First, Holabird points to two occasions when TTI contacted distributors to enforce its advertising policy. In June or July of 1990, William Greene, president of TTI ["Greene"] became aware that Sports Express, a distributor of tennis equipment, had placed an ad in *Tennis Magazine* that violated TTI's Statement of Policy. Although Sports Express was not yet a TTI dealer, it had placed the ad in an effort to determine potential interest in the machine. Greene immediately contacted that dealer and informed it that the ads violated TTI's policy and told Sports Express that, until the offending ads were removed, they would not be able to order Tennis Tutor machines. Sports Express responded that its practice was to respect manu-

facturer's policies and the ads would be removed. TTI then agreed to ship machines.

A similar scenario took place in November 1991 when Greene contacted one of its dealers, Associated Tennis Suppliers ["ATS"], to inform it that ads it placed in *Tennis Magazine* violated TTI's policy. ATS stated that it was not aware of the policy, apparently due to TTI's inadvertent failure to mail ATS a copy of the Statement. Once made aware of the policy, ATS agree to remove the offending ad and TTI agreed to continue to ship machines.

Second, Holabird asserts that the actions of TTI toward Holabird are "evidence of TTI's coercive efforts upon its dealers to secure illegal agreements." Opposition at 8. Holabird argues that the action of terminating Holabird for its offending advertisement itself, and offering to reinstate Holabird as a dealer if it agrees to abide by the policy, constitute the "something more" required by *Monsanto* to prove a conspiracy.

Finally, Holabird points to the fact that after terminating Holabird as a dealer, TTI contacted at least one dealer to prevent it from transshipping machines to Holabird. In February 1992, Greene learned the ATS had sold a Tennis Tutor machine to Holabird in violation of TTI's policy against transshipment. Greene contacted Matt Sherman, the manager of ATS, ["Sherman"] and explained that this violation could lead to its termination as a dealer. Sherman stated that he was not aware of the transshipment, but he would look into it. Sherman called Greene back and stated that another division had shipped the machine to Holabird without his knowledge, but in the future, ATS would respect TTI's policy against transshipment.

D. *Analysis*

Plaintiff relies heavily on *Monsanto* and *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960) to support its claim that these actions constitute a conspiracy. In *Monsanto,* the manufacturer informed two price cutting distributors that if they did not maintain the suggested resale price, they would not receive adequate supplies of the manufacturer's product. When one of the distributors did not assent, the manufacturer went to the distributor's parent company to request it put pressure on its subsidiary to comply. In response, the parent instructed the subsidiary to comply and it did. *Id.* at 765. The plaintiff also produced as evidence of the conspiracy a newsletter from one of the distributors to its dealer-customers. The newsletter was written after the distributor met with the manufacturer and discussed the manufacturer's efforts to "ge[t] the market place in order." The newsletter included language that the Court concluded could reasonably be interpreted as "referring to an agreement or understanding that distributors and retailers would maintain prices, and [the manufacturer] would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors." *Id.* at 766.

Parke, Davis, like *Monsanto,* involved a manufacturer's efforts to maintain retail price levels. After several retailers began offering their products at prices below Parke Davis' suggested minimum, Parke Davis instituted a program to promote observance of the minimum suggested retail prices. As part of that program, Parke Davis systematically contacted each of its wholesalers and informed them that it would refuse to sell to wholesalers who did not adhere to the policy, or to wholesalers who sold to retailers who did not observe the minimum retail prices. Parke Davis representatives also called on all the retailers to inform them of the policy. Each of the wholesalers and each of the retailers were informed that their

competitors were being similarly apprised of the policy. When that proved ineffective in curbing the price cutting, Parke Davis decided to modify the program to prohibit the advertising of discount prices. Representatives of the company again went to each of the retailers to elicit support for the policy. Parke Davis first obtained the tentative support of one of the largest retailers, Dart Drug, and then used the existence of that support to persuade other retailers. Parke Davis then went back to Dart Drug to report the support of the other retailers.

The Court found that in carrying out this series of actions, Parke Davis went beyond the limitations of the *Colgate* doctrine—"Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy." *Id.* at 45. With regard to that suspension of advertising, the Court observed:

> First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with a report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a

> manufacturer is unwilling to rely on individual self-interest to bring about voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.

Id. at 46-47.

Although there may be some superficial similarity between the actions deemed a conspiracy in *Monsanto* and *Parke, Davis,* and the actions of TTI, the Court finds that TTI's activities simply do not rise to the level of conspiracy proscribed by these decisions.[2] That conclusion is supported by recent decisions in which courts reached findings of no concerted action in the face of activities of defendants that were far more colorably "conspiratorial" than TTI's.

In *Parkway Gallery Furniture v. Kittinger/Pennsylvania House Group, Inc.,* 878 F.2d 801 (4th Cir. 1989), the Fourth Circuit applied the standard set forth in *Monsanto* and *Matsushita,* to uphold a district court's grant of summary judgment on the ground that the plaintiff had failed to provide adequate evidence of a conspiracy. In *Parkway Gallery,* the defendant manufacturer received complaints from its dealers that they were losing sales to discount dealers. As in the instant case, there was a concern that customers were visiting the complaining deal-

---

[2] The Court also notes that the precedential value of *Parke Davis* "has been cast into some doubt by *Monsanto.*" *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1478 (9th Cir. 1986).

ers stores for shopping, display and sales assistance, but then ordering the furniture from the discount dealers. In response to those complaints, the manufacturer revised its retail marketing policy to prohibit dealers from soliciting or selling its furniture by mail or telephone order outside specified sales areas. Before promulgating the policy, the manufacturer surveyed its dealers for reactions to the new policy. After being contacted by the manufacturer, one dealer indicated that it " 'totally agrees' with the policy and 'will abide totally.' " Another indicated that it was "willing to 'come around' and abide by the ban." Another dealer notified the manufacturer of a violation and sought enforcement. *Id.* at 803 (quoting testimony of manufacturer's employees). Nonetheless, the court concluded that the terminated discount dealers had not met the burden to

> present evidence that tends to exclude the possibility that the alleged conspirators acted independently . . . . Any evidentiary fact may support a wide range of inferences, but the discrete inferences necessary under *Monsanto* to support a conspiracy theory simply do not flow from [the evidence] that [the manufacturer] sought assurances from its dealers that they would comply with its new marketing policy.

Id. at 805-06.[3]

---

[3] The Fourth Circuit acknowledged that its interpretation of *Monsanto* and *Matsushita* is somewhat at odds with decisions of the Eighth and Eleventh Circuits finding evidence of concerted action in the defendant manufacturers' contacts with plaintiff distributors' competitors. *See McCabe's Furniture v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Helicopter Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987). The court expressed the view that "those decisions have in effect misconstrued 'tends to exclude the possibility' of independent conduct to mean something like 'arguably consistent with the possibility of a conspiracy.' *Parkway Gallery*, 878 F.2d at 806 n.4 (citation omitted).

In *The Jeannery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), the Ninth Circuit affirmed a magistrate's grant of a manufacturer's motion for judgment notwithstanding the verdict, holding that the plaintiff did not produce sufficient proof of a concerted action. In *The Jeannery*, the plaintiff presented evidence that the manufacturer exerted pressure on several retailers to capitulate to its suggested resale price, known in the industry as the "keystone" markup. The manufacturer told one retailer that if it did not comply with the policy, it would experience extreme difficulty in getting its orders filled. To another retailer, the manufacturer stated that, if it did not keystone, "orders could be lost, could be shipped to the wrong destination, or just never processed." *Id.* at 1159. The court noted that demands or threats, which could lead to a finding of concerted action, are to "be distinguished from mere 'exposition, persuasion, argument or pressure.'" *Id.* at 1158 (quoting *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1263 (9th Cir. 1983)). The court continued:

> Given that the manufacturer has every right to set the price at which it wants its goods resold and to terminate a dealer who undercuts that price, it is not surprising that a manufacturer would let a dealer know this policy. The greatest "difficulty" a dealer could experience in getting a product would be to suffer a termination. Certainly, then, a manufacturer may advise a dealer that its policy is to terminate a dealer who does not sell at keystone, or to favor filling orders placed by complying dealers. This is legitimate pressure to get a dealer to sell at keystone. No inference of antitrust conspiracy can be drawn from such evidence. It is ambiguous at best.

Id. at 1159.

A recent decision from the Southern District of Georgia further defines the amount of "pressure" a manu-

facturer can lawfully exert against distributors to enforce compliance with a marketing policy. In *Ben Sheftall Distributing Co. v. Mirta de Perales,* 791 F. Supp. 1575 (S.D. Ga. 1992), the plaintiff asserted that in an effort to force it to sell the manufacturer's products at a specified price, the manufacturer engaged in price discrimination between it and other distributors. When the plaintiff still failed to comply with the manufacturer's pricing plan, the manufacturer terminated the distributor. The distributor attempted to circumvent the termination by purchasing the manufacturer's products from another distributor in order to supply at least one of its customers. When the manufacturer discovered that the distributor was continuing to distribute its products, it contacted the customer and successfully persuaded it to stop purchasing products from the plaintiff. The plaintiff argued that these activities constituted a concerted effort to force it to comply with the manufacturer's policies. *Id.* at 1577-79.

The court granted the defendant's motion to dismiss. After a lengthy discussion of both *Parke, Davis* and *Monsanto,* the court concluded:

> The *Monsanto* Court was clear that unwilling compliance by dealers to avoid termination does not create an agreement and that compliance with a suggestion or announced condition does not amount to an implied agreement . . . . Where the actions involved are announcement and termination; monitoring of dealer performance through one's own employees or otherwise; or the use of third parties—to carry the message or to contact customers or replacement dealers—to effect a termination, no agreement is shown. At the same time, *Monsanto* leaves open the possibility of proving agreements by evidence that the manufacturer actively sought agreement through complex coercive means. Such evidence would naturally require a showing of individualized negotiations with dealers, meetings, repeated

> exhortations, and the use of third parties in a way other than to gather information or to effect termination.

Id. at 1582-83.

In *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985), the Fourth Circuit upheld the district court's grant of summary judgment based on plaintiff's failure to produce sufficient evidence to show concerted action. In *Terry's Floor Fashions*, as in the instant case, the defendant carpet manufacturer had a policy prohibiting dealer-to-dealer sales. As proof of a conspiracy, plaintiff asserted, among other actions, that the manufacturer enforced that policy by instructing other distributors not to sell carpeting to the plaintiff. In affirming the summary judgment, the court stated that the manufacturer's action in instructing other distributors not to sell to the plaintiff was consistent with the manufacturer's policy prohibiting dealer-to-dealer sales, which was part of its overall marketing strategy, and thus was not probative of the alleged conspiracy between the manufacturer and its distributors. *Id.* at 614.

IV. CONCLUSION

TTI has proffered a rational business purpose for its advertising restriction. Having unilaterally formulated a policy to strengthen its dealer network, the Court finds it entirely reasonable that TTI be permitted to communicate that policy to its dealers. Under Holabird's construction of § 1, TTI would have no choice but to immediately terminate its dealer upon learning that the dealer had violated TTI's marketing policy, regardless of whether the violation was inadvertently or knowingly committed. Antitrust law simply does not require that result.

Accordingly, the Court finds that the actions of TTI are "as consistent with permissible competition as with illegal conspiracy," and do not support an inference of

antitrust conspiracy. Holabird has not produced evidence that "tends to exclude the possibility" that TTI acted independently.

For the above stated reasons, Defendant's Motion for Summary Judgment will be granted. As separate order will issue.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: October 30, 1992.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WN-91-2208

HOLABIRD SPORT DISCOUNTERS

v.

TENNIS TUTOR, INC.

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 30th day of October, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion for Summary Judgment filed August 24, 1992 (Paper No. 28) is GRANTED;

2. That Plaintiff's Motion to Strike Declarations of Donald C. Deluca and Larry Brink is DENIED as moot;

3. That this case is hereby CLOSED;

4. That the Clerk of Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

APPENDIX D

EXCERPTS FROM DEPOSITION OF BILL GREENE TAKEN ON JUNE 16, 1992

* * * *

[6] Q. What is your position at Sports Tutor?

A. I am the president.

Q. Before the corporation was called Sports Tutor, Inc., did it have another name?

A. Yes.

Q. What was the other name?

A. Tennis Tutor, Inc.

Q. Was it incorporated as Tennis Tutor, Inc.?

A. Yes, it was.

Q. Was there a formal name change to make it Sports Tutor, Inc.?

A. Yes.

* * * *

[35] Q. At the time that the Tennis Tutor ball machine originally was sold, were there any other battery-powered tennis ball machines on the market in the [36] United States?

A. No.

Q. Since the Tennis Tutor ball machine originally was sold through today, are there any other battery-powered tennis ball machines on the market in the United States?

A. No.

* * * *

[151] Q. Now you also state in the last sentence "public court players can't use A.C.-powered ball machines because most public courts do not have accessible electrical power." What was your basis for making that statement?

A. Well, that statement—according to our research, 80 percent, approximately 70, 80 percent of public courts

do not have electric power. That means that if you have a facility that has five courts and only one of them has power, then only 20 percent of the courts have power and 80 percent don't have power, so it's not the number of facilities that don't have power, it's the number of courts that don't have power, ...

* * * *